No. 117.

The Robert Clarke Company, Printers.

Office Supreme Court
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JAMES H. McKENNEY,
Clerk

Brf. of Kittredge & Wilby for Def.

Supreme Court of the United States.

OCTOBER TERM, 1902.

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Error to the United States Circuit Court of Appeals for the Sixth Circuit.

George Bleistein, et al.,
Plaintiffs in Error,

vs.

The Donaldson Lithographing Company,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

EDMUND W. KITTREDGE,
For Defendant in Error.

E. W. KITTREDGE,
JOSEPH WILBY,
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I conceive that much of the argument in the brief for the plaintiffs in error is not founded on the record in the case.

This was an action by the plaintiffs in error, based upon Section 4965 of the Revised Statutes of the United States, as amended by the acts of March 3, 1891, and March 2, 1895, to recover the sum of one dollar each as a penalty for the publication of 23,795 sheets in the nature of programmes of performances to take place at the circus of B. E. Wallace.

The petition alleged that these sheets were infringements of the plaintiffs' copyrights in three different lithographic prints, copyrighted under the following titles:

(1) Spectacular Ballet Design;
(2) The Stirk Family Design; and
(3) Statutary Act Design.

The defendant answered, pleading the general issue under Section 4969 of the Revised Statutes of the United States.

At the trial in the Circuit Court, on the conclusion of the evidence for the plaintiffs, the Court instructed the jury to return a verdict for the defendant.

The evidence established that these three prints were ordered by B. E. Wallace, proprietor of the circus known as the "Wallace Shows," as advertising matter for that show.

Mr. Bleistein, one of the plaintiffs, testified as follows (R., p. 30.)

"Q. Mr. Bleistein, those three pictures that have been introduced, who were they made for?

A. They were sold to Mr. Wallace.

Q. They were made, were they not, under contract with Mr. Wallace for them?

A. Yes, practically so.

Q. They were made under a contract with them and for them. Did you make the contract?

A. I don't remember that I made that specific one, the year that these were printed in.

Q. Who did represent the joint-stock company in making that contract?

A. Either Mr. John A. Rudolf or myself.

Q. Can't you tell whether it was yourself?

A. I am not positive. Some years Mr. Rudolf did. I rather think Mr. Rudolf did.

Q. The Wallace Company is a circus company, is it not?

A. Mr. B. E. Wallace, yes, owns the Wallace Show.

Q. Known as the 'Wallace Show,' and this was made under contract with them as an advertisement of their show, was n't it?

A. Yes.

Q. Never has been made for anybody else, has it?

A. Not up to the present time that I know of.

Q. That 's what I am asking about. And where was this contract made with Mr. Wallace?

A. I think it was made in Peru, Indiana, where he lives.

Q. Where Mr. Wallace lives? That is true in reference to each of those papers?

A. Yes.

Q. What you have said about the one I have been showing to you—which was the Ballet picture—is true as to each of them?

A. Yes, sir.

Q. That is to say, they were made for Mr. Wallace under contract with him as an advertisement for his show, and they have never been made for anybody else?

A. Not up to the present time."

Mr. Bleistein, it thus appears, did not make the contract with Mr. Wallace; and any testimony that he undertook to give in regard to it was hearsay. This testimony was elicited in an examination by the trial judge, during which the witness, who had no personal knowledge of the contract with Mr. Wallace, was permitted to testify to a usage or custom of the Courier Lithographing Company in all its contracts to reserve to itself the rights of design which they put in copyright; and he claimed, under this usage, that if Mr. Wallace ceased to use these pictures, that is to say, did not do the statuary act, etc., that then the plaintiffs would have a right to sell these pictures to other people who might want to use them for their shows.

There was not a word of testimony offered to show that Mr. Wallace had any knowledge of such usage or custom of the Courier Company, or that any reservation of such right entered into the contract with him for furnishing him with these posters. All of these pictures purported to be representations of acts to be done in the Wallace Shows, and all were made under a representation by Wallace, expressed on the face of the pictures, that his show was going to do these things. All these posters contain reading matter indicating that these were pictures of acts to be done in the Wallace Shows, and they all included pictures of Mr. Wallace himself.

This same witness testified or admitted (R., p. 37) that Mr. Wallace furnished his own picture and the reading matter which was part of the picture claimed to be copyrighted, and that each of these pictures was a representation of what the Wallace Circus professed to exhibit to the public, and that he gave the Courier Company the descriptions of

these scenes to enable them to execute the prints for that purpose.

The copyrights were taken under the act of Congress of June 18, 1874, which I print in full, italicizing the clauses to which I wish particularly to direct the attention of the Court (p. 78):

> "An act to amend the law relating to patents, trade marks, and copyrights.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz: 'Entered according to act of Congress, in the year ——, by A. B., in the office of the Librarian of Congress, at Washington; *or, at his option the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out; thus—'Copyright*, 18—, *by A. B.*'
>
> Sec. 2. That for recording and certifying any instrument of writing for the assignment of a copyright, the Librarian of Congress shall receive from the persons to whom the service is rendered, one dollar; and for every copy of an assignment, one dollar; said fee to cover, in either case, a certificate of the record, under seal of the Librarian of Congress; and all fees so received shall be paid into the Treasury of the United States.
>
> Sec. 3. *That in the construction of this act, the words 'Engraving,' 'cut,' and 'print,' shall be applied only to pictorial illustrations or works connected with the fine arts*, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of

prints, except that there shall be paid for recording the title of any print or label not a trade mark, six dollars, which shall cover the expense of furnishing a copy of the record under the seal of the Commissioner of Patents, to the party entering the same.

Sec. 4. That all laws and parts of laws inconsistent with the foregoing provisions be and the same are hereby repealed.

Sec. 5. That this act shall take effect on and after the first day of August, eighteen hundred and seventy-four."

Approved June 18th, 1874.

The petition alleged in respect to each of these prints that the plaintiffs "designed and engraved a lithographic print, cut or engraving, styled Spectacular Ballet Design," and it contained no allegation that the print, cut or engraving was a "pictorial illustration or work connected with the fine arts." There was no allegation that these pictures were chromos or chromo-lithographs, and there was no proof given at the trial that these pictures were chromos or chromo-lithographs.

Our learned adversary, coming to the consideration of this law of June 18, 1874, says upon page 34 of his brief: "We might well argue that the pictures involved in this case, which are chromos, are not covered by the provisions of this statute." This was the claim of our learned adversary in the Circuit Court of Appeals, and a large portion of his brief in this court is devoted to a discussion of chromos, how they are made, and their merits as pictures, for the purpose of showing that they are not "prints, cuts or engravings," within the meaning of the act of June 18, 1874.

But there are several difficulties in the way of this contention. In the first place these prints, in the inscription upon them which was essential to their validity and any right of action for the infringement of them, was in pursuance of the last clause of the first section of the act of 1874. Thus, upon each picture:

"Copyright, 1898, Courier Litho. Co., Buffalo, N. Y."

But for the provision in the first clause of this act this inscription would have been fatal to the plaintiffs' right of action, under the decision of this court in *Thompson* v. *Hub-*

bard, 131 U. S. 123. The inscription prescribed by Section 4962 of the Revised Statutes was otherwise indispensable to the maintenance of an action for the infringement of a copyright. The notice given on each one of these pictures was that authorized by this act of June 18, 1874. Having thus availed themselves of the provisions of this act, clearly the plaintiffs are not in position to claim that the pictures are not covered by its provisions. Again, if these pictures were chromos, and not prints, cuts or engravings, then under the allegations of the petition they were not admissible in evidence because they were not in support of the allegations of the petition.

However, in the case of *Yuengling* v. *Schile*, 12 Fed. Rep. 107, chromo-lithographs are defined and distinguished from lithographic prints, and it is held that both chromos and lithographic prints are included in the more general term "prints," and are subject to the provision of the statutes applicable to prints in general.

Our adversary, in this court, does not propose to stand upon the proposition that these prints are chromos and therefore are not covered by the provisions of this statute, and he finds it necessary to discuss the proper construction of the language of the statute. He does this by claiming that the words "pictorial illustrations" are to be taken independently of and disconnected from the words that follow, and that Congress has thereby provided for the protection of prints, which are pictorial illustrations, without limitation. But how is it possible to construe this language of the statute by disconnecting the words "pictorial illustrations" from the remainder of the clause? The language is "pictorial illustrations or works connected with the fine arts." There is no comma or other punctuation after the word "illustrations," as printed in the 18th Statutes at Large, page 79; and while this may not be of great significance, it renders the grammatical construction consistent with what the court below held to be the obvious intent of Congress, that these words were to be applied only to "pictorial illustrations or works (the latter word being only an amplification of the former) connected with the fine arts."

Every "engraving," "cut" or "print" is in some sense a pictorial illustration of something. That is as true of cuts

or prints to be used as advertisements of articles of manufacture as of cuts or prints of advertisements of a circus. To say, as our adversary in effect does, that cuts or prints are made the subject of copyright without limitation, would be practically to annul the first clause of the provision of this section of this statute in question.

Our adversary practically asserts that all of the language of this statute relating to the construction of the words "engraving," "cut" or "print" has no force or effect whatever. Since if the first paragraph of Section three, instead of reading as it does, commenced with the third line of the Section and read as follows: "No prints or labels designed to be used for any other article of manufacture shall be entered under the copyright law, but may be registered in the Patent Office," this statute would have all of the force that our adversary gives to it. It is idle, as it seems to me, to say that the first clause of this section was only intended to distinguish ordinary prints or labels to be used for any other articles of manufacture from other pictorial illustrations, and it would be equally difficult to find a reason why prints designed to be used for articles of manufacture any more than prints designed to advertise such scenes for a circus shall not be entered under the copyright law.

This court recently held in the case of *Bolles* v. *Outing Company*, 175 U. S., p. 262, that the statute being penal, if the language is ambiguous the court will lean more strongly in favor of the defendant than it would if the statute were remedial. Mr. Justice Brown, delivering the opinion, said:

> "This is an action to recover a penalty of one dollar for every copy of the plaintiff's photograph, and is based upon Revised Statutes, section 4965, which declares that any person offending against its provisions 'shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported or exposed for sale, . . . one-half thereof to the proprietor and the other half to the use of the United States.' This is clearly a penal statute in that it fixes a single and arbitrary measure of recompense to the plaintiff, irrespective of the damages actually

> sustained by him, or of the profits realized by the defendant; and in the further provision that one-half of the amount recovered shall be to the use of the United States. It makes no pretense of awarding damages, and simply imposes a forfeiture of a specified sum. . . . The penal character of the act is further emphasized by the fact that the plaintiff apparently recovers a moiety for the use of the United States, though perhaps this is not beyond a doubt suggested in *Thornton* v. *Schreiber*, 124 U. S. 612. . . . The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial."

It is difficult to see how there is any ambiguity in the provision of the statute in question, in the language which declares that "in the construction of this act, the words 'engraving,' 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts." And when our adversary says (Br. 34) that, "the truth is that this statute does not furnish any basis or test whatever for deciding whether a picture is copyrightable, and was not intended to do so," it is difficult for me to understand his meaning. In every case that has been decided since the passage of the act, so far as I have been able to find, this language of the statute has been held to be a limitation upon the right to copyright prints, cuts or engravings. Thus, in the case of *Rosenbach* v. *Dreyfuss*, 2 Fed. Rep. 217, the court, Choate, J., lays down two propositions pertinent to the case at bar. At page 224, he says:

> "The complaint must state a case for recovery with reasonable certainty, and in case of doubt a pleading must be taken most strongly against the pleader. It is not enough that the defendant may be liable if the facts stated are true, it must appear that he is liable."

And on page 222:

> "As to prints, in addition to what has been said, it is only necessary to refer to the statute of June 18, 1874. . . . The third section provides that, 'In the construction of this act the words "engraving," "cut" and "print" shall be applied only to pictorial illustrations or works connected with the fine acts.'"

The opinion in the above case refers to the case in 9 Weekly Digest (N. Y.), 340, decided by Judge Blodgett, under a similar statute, where the court say:

> "This being a highly penal statute, it was the duty of the pleader in making a case under it, to negative all presumptions in favor of the innocence of the defendant."

In *Ehret* v. *Pierce*, 10 Fed. Rep. 554 (also reported in 18 Blatchford, 302), which was a case of a color card intended to represent different shades of paint, the court say:

> "True, it has lithographic work upon it, and also words and sentences; but it has none of the characteristics of a work of art or of a literary production. It is an advertisement, and nothing more."

In *Schumacher* v. *Wogram*, 35 Fed. Rep. 210, the plaintiff designed a picture representing a young woman holding a bouquet of flowers, to be printed on labels for cigar boxes, which he attempted to copyright, and Wallace, J., says:

> "The facts show an attempted evasion by the plaintiffs of the provisions of Section 3 of the Act of Congress of June 18, 1874, 'To amend the law relating to patents, trade-marks and copyrights.' That section declares in substance that no prints or labels designed to be used for any article of manufacture can be copyrighted, but authorizes them to be registered and protected as trade-marks in proper cases. If the experiment of the plaintiffs can succeed, this statute is inoperative whenever the prints or labels contain a pictorial illustration; and it could be wholly nullified by the device of printing pictures on the labels."

Our adversary, in quoting the different paragraphs of the opinion of Judge Lurton, of the Circuit Court of Appeals, it seems to me does not do justice to that opinion.

The opinion, however, is printed in full in the record, and in 104 Fed. Rep., at page 994. The learned judge quoted from the decision of this court in *Higgins* v. *Keuffel*, 140 U. S. 428. In this latter case the question arose in reference to a label which the plaintiff claimed to have copyrighted under the act of Congress in question, of June 18, 1874. In the course of the opinion the court says, at page 434:

> "The act of June 18, 1874, changes the previous law in some respects. . . . It also declares that the words 'engraving,' 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts; and also that no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the patent office."

It was held in England, in the case of *Cobbett* v. *Woodward*, L. R. 14 Eq., 407, which arose upon a claim of copyright for a catalogue of furniture containing many pictorial illustrations of furniture and decorations, that, as it was intended as an advertisement, and not as a work of art, it was not entitled to protection under the copyright law. Our adversaries, upon page 36 of their brief, cite later English cases in which the decision in *Cobbett* v. *Woodward* is thought to have been limited in its scope. But this court cited the case of *Cobbett* v. *Woodward* with approval, and without any apparent disposition to limit its scope, in *Baker* v. *Selden*, 101 U. S., 106. The opinion in this latter case, delivered by Mr. Justice Bradley, contains so much in respect to the principles underlying this subject that is pertinent to the case at bar, that I cannot forbear quoting from it at some length:

> "The remarks of Mr. Justice Thompson in the Circuit Court in *Clayton* v. *Stone & Hall* (2 Paine, 392), in which copyright was claimed in a daily price-current, are apposite and instructive. He says: 'In determining the true construction to be given to the act of Congress, it is proper to look at the Constitution of the United States, to aid us in ascertaining the nature of the property intended to be protected. "Congress shall have power to promote the progress of science and useful arts, by securing for limited

times to authors and inventors the exclusive right to their writings and discoveries." The act in question was passed in execution of the power here given, and the object, therefore, was the promotion of science; and it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them. They are of a more fixed, permanent, and durable character. The term "science" cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price-current, the subject-matter of which is daily changing, and is of mere temporary use. The title of the act of Congress is, "for the encouragement of learning," and was not intended for the encouragement of mere industry, unconnected with learning and the sciences. . . . We are, accordingly, of opinion that the paper in question is not a book the copyright to which can be secured under the act of Congress.'

"The case of *Cobbett* v. *Woodward* (Law Rep. 14 Eq. 407), was a claim to copyright in a catalogue of furniture which the publisher had on sale in his establishment, illustrated with many drawings of furniture and decorations. The defendants, being dealers in the same business, published a similar book, and copied many of the plaintiff's drawings, though it was shown that they had for sale the articles represented thereby. The court held that these drawings were not subjects of copyright. Lord Romilly, M. R., said: 'This is a mere advertisement for the sale of particular articles which any one might imitate, and any one might advertise for sale. If a man not being a vendor of any of the articles in question were to publish a work for the purpose of informing the public of what was the most convenient species of articles for household furniture, or the most graceful species of decorations for articles of home furniture, what they ought to cost, and where they might be bought, and were to illustrate his work with designs of each article he described—such a work as this could not be pirated with impunity, and the attempt to do so would be stopped by the injunction of the Court of Chancery; yet if it were done with no such object, but solely for the purpose of advertising particular articles for sale, and promoting the private trade of the publisher by the sale of articles which any other person might sell as well as the first advertiser, and if in fact it contained little more than an illustrated inventory of the con-

> tents of a warehouse, I know of no law which, while it would not prevent the second advertiser from selling the same articles, would prevent him from using the same advertisement; provided he did not in such advertisement by any device suggest that he was selling the works and designs of the first advertiser.'"

In Mott Iron Works v. *Clow*, 82 Fed. Rep., referred to below, at page 320, the court, after discussing the difference between the English statutes and our own, and the cases which, under the English statute, were held to limit the authority of *Cobbett* v. *Woodward*, say:

> "The ruling of the English court is therefore not pertinent, except as it illustrates the subject. It is further to be said that the case of *Cobbett* v. *Woodward*, overruled by the case of *Maple & Co.* v. *Junior Army and Navy Stores*, has been expressly approved and quoted at length by the Supreme Court of the United States."

The decision of the Circuit Court in this case of *Mott Iron Works Co.* v. *Clow*, is reported in 72 Fed. Rep. 168. The construction of the statute now under consideration by that court was given apparently without hesitation. The action was upon a copyright of advertising sheets containing a description of porcelain baths, which also contained cuts or prints of such baths, with ornamental settings; and the court, in determining upon a demurrer whether such cuts or prints were a proper subject-matter of copyright, say, Grosscup, J.:

> "The cuts or prints shown in complainant's sheets, in connection with their ornamental settings, may have such artistic merit as would support a copyright if offered as a work of fine art. The statutes, as amended by the act of 1874, *limit the right of copyright to such cuts and prints as are connected with the fine arts.* But the bill does not show that the author or designer intended or contemplated these cuts or prints as works of fine art. No copyright was asked upon them separately from the advertising sheet of which they are a part. They are not offered to the public as illustrations or works connected with the fine arts, but are adjuncts simply to a publication connected with a useful art. The court will not supply an intention that the author or designer has not avowed, or give to

> the cuts or prints a character and purpose different from what their surroundings indicate." Demurrer sustained.

In this case upon appeal to the Circuit Court of Appeals for the Seventh Circuit, 82 Fed. Rep. 316, the court, referring to the cuts or prints in the illustrated catalogue, say (p. 318):

> "In brief, they are mere advertisements of the appellant's wares, with nice cuts or illustrations of the goods accompanying and forming part of the advertisement, as an allurement to customers. The question, therefore, which confronts us, is, were such things intended to be protected by the constitutional provision in question?"

This is followed by a general discussion of the constitutional provision and of the act of Congress, which is concluded by the following language referring to the case of *Higgins* v. *Kueffel*, cited by our adversaries (p. 321.)

> "In the latter case of *Higgins* v. *Kueffel*, 140 U. S. 428, the court observes that the provision of the constitution 'evidently has reference only to such writings and discoveries as are the result of intellectual labor;' and, 'to be entitled to a copyright, the article must have by itself some value as a composition, at least to the extent of serving some useful purpose other than as a mere advertisement or designation of the subject to which it is attached.' So far as the decisions of the Supreme Court have gone, we think they hold to the proposition that mere advertisements, whether by letterpress or by picture, are not within the protection of the copyright law. It is possibly not beyond comprehension that pictures of slop sinks, wash bowls, and bath tubs, with or without letterpress statement of dimensions and prices, though intended mainly for advertisement, may, in localities where such conveniences are not in common use, be the means of instruction and advancement in knowledge of the arts, and, when they are the product of original, intellectual thought, may possibly come within the scope of the constitutional provision. It is enough for the present purpose to say that, in our judgment, Congress has not seen fit to enact a law which can reasonably be given so broad a construction."

Judge Lurton, delivering the opinion of the Court below in the case at bar, after recapitulating certain facts disclosed by the evidence, and citing cases to which we have referred, states that the court found it necessary to pass upon only one of the points presented in the case, which was the matter I have so far endeavored to discuss. He said, in closing:

> "What we hold is this, that if a chromo, lithograph or other print, engraving or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the constitutional provision to protect the 'author' in the exclusive use thereof, and the copyright statute should not be construed as including such a publication if any other construction is admissible. If a mere label simply designating or describing an article to which it is attached, and which has no value separated from the article, does not come within the constitutional clause upon the subject of copyright, it must follow that a pictorial illustration designed and useful only as an advertisement, and having no intrinsic value other than its function as an advertisment, must be equally without the obvious meaning of the Constitution. It must have some connection with the fine arts to give it intrinsic value, and that it shall have is the meaning which we attach to the act of June 18, 1874, amending the provisions of the copyright law.
>
> "We are unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error other than as an advertisement of acts to be done or exhibited to the public in Wallace's Show. No evidence aside from the deductions which are to be drawn from the prints themselves was offered to show that these designs had any original artistic qualities. The jury could not reasonably have found merit or value aside from the purely business object of advertising a show, and the instruction to find for the defendant was not error."

II.

The petition alleged that the plaintiffs, under the name of the "Courier Lithographing Company" or the "Courier Company," designed and engraved each lithographic print, cut or engraving which was the subject-matter of the action. That is to say, the petition alleged that the plaintiffs themselves were the authors of these lithographic prints. There is no pretense that there was any evidence offered tending to show that the plaintiffs themselves, or either of them, were the authors of these prints. It was claimed that they were the proprietors because, as they also claimed, the design or conception was that of their employes, working for them, under a salary, and that their designs were the property of the employer.

It was incumbent upon the plaintiff to allege and prove who was the author, inventor or designer of the prints in question. If they were not themselves the authors, then it was incumbent upon them to allege how they acquired title as proprietors from the author, inventor or designer. The petition having alleged that they themselves were the authors, issue was joined upon that allegation, and even if it had been proved that these prints had been designed by employes of the plaintiffs, who were paid by the plaintiffs, under an express or implied contract that their designs should become the property of the plaintiffs, nevertheless this would have been a fatal variance. No issue was presented as to their having acquired title by contract from those who were in fact the authors, inventors or designers. The importance of this failure of proof to support the allegation of the petition is illustrated by the decision of this court in the case of *Lithographic Co.* v. *Sarony*, 111 U. S. 53. Mr. Justice Miller, in delivering the opinion in that case, says on p. 59:

> "In regard to the kindred subject of patents for invention, they cannot by law be issued to the inventor until the novelty, the utility, and the actual discovery or invention by the claimant have been established by proof before the Commissioner of Patents; and when

he has secured such a patent, and undertakes to obtain redress for a violation of his right in a court of law, the question of invention, of novelty, of originality, is always open to examination. Our copyright system has no such provision for previous examination by a proper tribunal as to the originality of the book, map, or other matter offered for copyright. A deposit of two copies of the article or work with the Librarian of Congress, with the name of the author and its title page, is all that is necessary to secure a copyright. It is, therefore, much more important that when the supposed author sues for a violation of his copyright, the existence of those facts of originality, of intellectual production, of thought, and conception on the part of the author, should be proved, than in the case of a patent right.

. . . . . .

The question here presented is one of first impression under our Constitution, but an instructive case of the same class is that of *Nottage* v. *Jackson*, 11 Q. B. D. 627, decided in that court on appeal, August, 1883.

The first section of the act of 25 and 26 Victoria, chap. 68, authorizes the *author* of a photograph, upon making registry of it under the copyright act of 1882, to have a monopoly of its reproduction and multiplication during the life of the author.

The plaintiffs in that case described themselves as the authors of the photograph which was pirated, in the registration of it. It appeared that they had arranged with the captain of the Australian cricketers to take a photograph of the whole team in a group; and they sent one of the artists in their employ from London to some country town to do it.

The question in the case was whether the plaintiffs, who owned the establishment in London, where the photographs were made from the negative and were sold, and who had the negative taken by one of their men, were the authors, or the man who, for their benefit, took the negative. It was held that the latter was the author, and the action failed, because plaintiffs had described themselves as authors.

Brett, M. R., said, in regard to who was the author: 'The nearest I can come to, is that it is the person who effectively is as near as he can be, the cause of the picture which is produced, that is, the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position,

and arranging the place where the people are to be—the man who is the effective cause of that.'

"Lord Justice Cotton said: 'In my opinion "author" involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph.'"

The author of a picture is the man who has superintended the arrangement, who has actually formed the picture by putting the people into position, and arranging the place in which the people are to be. "To constitute one an author, he must, by his own intellectual labor, applied to the materials of his composition, produce an arrangement or compilation new in itself." *Atwell* v. *Ferret*, 2 Blatch. 46.

The author, inventor or designer, to be entitled to a copyright, must be both the person who invented the arrangement and who gave it visible form by representing it. *Bimms* v. *Woodworth*, 4 Wash. C. C. Rep. 48.

I claim that upon the allegations of this petition the defendant was not put upon inquiry as to whether the plaintiffs' employes were, within the meaning of the law, the designers of these pictures. If the plaintiffs failed to prove their title as they alleged it, the defendant was entitled to a verdict.

The Circuit Court of Appeals declared that (R. 74):

> "There was no evidence touching the originality of any of these designs other than the general statement of one of the plaintiffs that Mr. Wallace represented that these acts were to be done in his show, and that the designs as copyrighted were the 'creations of our employes.'"

The trial judge, who heard the evidence, declared that the Courier Lithographing Company

> "Is certainly not the author, inventor or designer of the things copyrighted, and how it, under the circumstances, can be the proprietor of it, is not clear to the court."

The learned counsel for the plaintiff in error takes issue with the finding of the court below, and asserts that the original designer of these pictures had been clearly proven, in sweeping terms, by the plaintiffs' first witness, Mr. Bleistein (Br. 14). It will certainly require a more careful analy-

sis of the evidence than is contained in the plaintiff's brief, to induce this court to disregard the finding of the courts below. When the court examines the testimony of this witness Bleistein, on pages 36 and 37, it will be seen that all the witness knew of his own knowledge in regard to the design of these pictures was that he saw a Mr. Bandlow, an employe, working on the ballet picture; and he thereupon proceeded to admit that Mr. Wallace, the proprietor of the Wallace Show, employed the plaintiffs, under a contract, to get up these prints as "special paper" to represent scenes or attitudes or groups, which they, the Wallace Circus Company, and nobody else, proposed to exhibit as a part of their show. They were, upon their face, advertisements of Wallace's Circus, and were and could be of no possible use to anybody else. Each one of these pictures was a representation of what the Wallace Circus Company professed to exhibit to the public, and it was so declared upon the face of the pictures. They were all made under a representation by Mr. Wallace that he was going to do these things, and that he wished these acts, as he described them, represented on colored bills, for exhibition, as advertisements for his show. All the bills contained reading matter that these were acts to be done in Wallace's Circus, and included the pictures of Mr. Wallace himself, furnished by him. Copies of the pictures deposited with the Librarian of Congress included this reading matter and the picture of Mr. Wallace. The pictures seized and put in evidence as proof of infringement, show, upon their face, that they were programmes or show bills made for Mr. Wallace, for the Wallace Show. The copyrighted pictures are what is styled "special paper"—that is, they were show bills made especially for him. And Mr. Bleistein admitted that so long as Mr. Wallace continued to use them, the plaintiffs had no right to manufacture them for or to sell them to anybody else. He claimed, however, that if Mr. Wallace "ceases to use that bill, say he does not do the statuary act next year, we have a right to sell the design to other people who may want to use that sort of thing."

If an engraving is executed for pay, or for a valuable consideration, for a particular person, as an advertisement of his property or exhibition, surely the copyright belongs to that person, under any implication growing out of the

contract of employment under which the work is executed. An inchoate right to a copyright may be transferred by parol prior to the taking of the copyright. The legal right to a copyright may remain in the proprietor, while the beneficial interest, to the extent which is agreed upon, may be in another party.

Black v. *Allen Co.*, 42 Fed. Rep. 618; s. c., 56 Fed. Rep. 764.

In the case of the *Press Pub. Co.* v. *Falk*, 59 Fed. Rep. 324, the court say, at page 325:

> "When a person has a negative taken and photographs made, for pay, in the usual course, the work is done for the person so procuring it to be done, and the negative, so far as it is a picture, or capable of producing pictures, of that person, and all photographs so made from it, belong to that person; and neither the artist nor any one else has any right to make pictures from the negative, or to copy the photographs, if not otherwise published, for any one else. *Pollard* v. *Photograph Co.*, 40 Ch. Div. 345; *Moore* v. *Rugg*, 46 N. W. 141."

The case cited, of *Pollard* v. *Photograph Co.*, distinctly holds that when a photograph is made for a person, for a price paid by him, he is entitled to the copyright of it, if it be a proper subject to copyright.

In the case of *Dielman* v. *White*, 102 Fed. Rep. 892, the plaintiff accepted and executed a commission to furnish and deliver two mosaic panels from designs to be made by him. After he had painted the cartoons from which the panels were made, he copyrighted the same, and then he brought the action against the defendant, who took photographs of the mosaics after they were in place, for infringement of his copyright. The Court, in deciding the case, say at page 894:

> "Taken by itself, the contract seems to me plainly inconsistent with any reservation of copyright on the part of the artist. In general, when an artist is commissioned to execute a work of art not in existence at the time the commission is given, the burden of proving that he retains a copyright in the work of art executed, sold, and delivered under the commission rests heavily

> upon the artist himself. If a patron gives a commission to an artist, there appears to me a very strong implication that the work of art commissioned is to belong unreservedly and without limitation to the patron. It is not necessary to decide if the artist retains the right to make for another a replica. Reproduction by the artist may be a question of artistic ethics rather than of law; but that the patron has a right to make and permit, to any extent, reproductions of the work of art sold to him, appears to me plain, unless the contrary is plainly set out in the contract."

And the Court cites *Parton* v. *Prang*, 3 Clifford, 537, in support of this ruling.

In the case of *Little* v. *Good*, 2 Blatch., 166, an officer was authorized to prepare for publication reports of decisions, and to provide for publishing the same, and to take a copyright of the reports in his name. Under a contract with a printer that in consideration that he would print the book of reports, he should, for five years, have the exclusive benefit of the copyright to be taken in the name of the officer, as proprietor, it was held that the copyright was held in trust by the officer, as proprietor, for the printer, who was entitled to the benefit of it, and had a perfect equitable title to it during the period of five years.

Now, assuming, for the sake of the present argument, that these pictures in this case were the proper subject-matter of copyright; and that Mr. Wallace, for a sufficient consideration, contracted with the plaintiffs that they should design and print for him the three boxes of pictures that were shipped to him on April 11, 1898, for use as advertisements, representing the scenes to be exhibited in his show, and if that was the whole contract, then under these decisions the plaintiffs had no right to take a copyright of them, or either of them. The pictures, in that event, belonged unreservedly and without limitation to Mr. Wallace. But if the plaintiffs, by the express terms of the contract, retained a right to copyright these pictures, the burden of proving which "rested heavily" upon them; and if it was also a part of the contract that as long as Mr. Wallace continued to do these acts in his show, and to use these posters in advertising them, the plain-

tiffs had no right, and reserved none, to publish and sell these prints to other people, then during that period the plaintiffs held the copyright in trust for the sole use and benefit of Mr. Wallace, who had a perfect right to make and permit, to any extent, reproductions of these prints in the programmes of his circus; just as in the case of *Little* v. *Good*, the printer during the term of five years had the sole right to print and publish the reports which were the subject-matter of copyright in that case for the term of five years. These sheets that were seized in the possession of the defendant were, upon their face, manifestly made for Mr. Wallace for use by him to distribute among people whom he wished to patronize his show.

In view of the law as thus established, there is no aspect of the evidence in this case which presented a state of facts entitling the plaintiffs to maintain this action; and the instruction by the trial court to render a verdict for the defendant was right.

III.

The petition alleged that the print called the "Statuary Act Design" was deposited under the statute to complete the copyright, on the 18th of April, 1898. (R., p. 6.) There was no allegation in the petition that this picture was deposited in the mail, addressed to the Librarian, prior to that date, or that any steps were taken by the plaintiffs prior to that date to secure a copyright upon it. The evidence shows that a large number of copies of this "Statuary Act Design" were shipped from Buffalo on April 11, 1898, addressed to the agent of the Wallace Shows, at Peru, Indiana; our adversary adds, "*due to arrive there on April 15th.*" He would thus imply that the ordinary time of transit from Buffalo to Peru would have brought them to Mr. Wallace on April 15th. But this was not the testimony. The testimony is simply that according to the plaintiffs' contract with Mr. Wallace, they were under obligations to deliver this picture to Mr. Wallace on or before April 15, 1898.

I need not dwell further upon this part of the case; but I wish to say that my learned adversary seems to argue that

if the defendant did not demur to the petition, it could not object to the absence of allegations of essential facts at the trial of the case; and, further, that if the proof offered was fatally at variance with the allegations of the plaintiffs' title as contained in the petition, it did not affect the plaintiffs' right to have the case submitted to the jury on such evidence, and that without amendment of or application to amend the petition.

I can only say that I do not so understand the law applicable to this subject. On the contrary, I claim that it is incumbent upon the plaintiffs, in a case like this, for the recovery of penalties, to allege and to prove as alleged, every fact essential to the validity of their copyright. As was said by this court in *Jones* v. *Van Zandt*, 5 How, 372:

> "It is admitted that this prosecution being a penal one, the declaration must bring it within the statute clearly, whether looking to its language or spirit. Dwarris on Statutes, 736; 5 Dane's Abr. 244, sec. 8; Simmon's case, 4 Wash. C. C. 397. It is not necessary to multiply authorities on so elementary a proposition."

IV.

In regard to the question whether either of these pictures, and especially the Ballet Act Design, are immoral in their tendency, and therefore are not subjects of copyright, I ask the court to look at the original pictures, which are not printed in the record, but will be before the court. The trial judge said (Rec., p. 64):

> "That the picture which represents a dozen or more figures of women in tights, with bare arms, and with much of the shoulders displayed, and by means of which it is designed to lure men to a circus, is in any sense a work of the fine arts, or are pictorial illustrations in the sense of the statute, I do not believe. The court does not think that it was in any wise intended by Congress that such a picture should be the subject of the exclusive advantages given by the privilege of copyrighting. Instead of being either useful art, or fine art, it is something to be regarded

as merely frivolous, and to some extent immoral in tendency."

That the copyright law does not protect what is immoral in its tendency is abundantly settled. A print representing unchaste acts or scenes calculated to excite lustful or sensual desires in those whose minds are open to such influences, and to attract them to witness the performance of such scenes, is manifestly of that character. It is the young and immature and those who are sensually inclined who are liable to be influenced by such scenes and representations, and it is their influence upon such persons that should be considered in determining their character.

In *Broder* v. *Zeno Maucais Music Co.*, 88 Fed. Rep. 74, at 79, the Court, describing the character of immorality that rendered a song not the subject of copyright, said that:

"It had an indelicate and vulgar meaning,"

And, therefore, was not the subject of protection by the copyright law.

The Supreme Court, in *Dunlop* v. *United States*, 165 U. S. 501, say:

"The true test of what constitutes obscene literature is that which tends to deprave the morals by exciting sensual desires and lascivious thoughts."

The act for the protection of dramatic compositions is *in pari materia*, and the same considerations applicable to it, in so far as this question is concerned, we submit, are applicable to the case at bar.

The case of the Black Crook (*Martinetti* v. *Maguire*, Fed. Cases, No. 9173), is quite on a par with the case at bar.

In view of the facts disclosed by the evidence, and of the authorities to which I have referred, I claim:

1. That the statute limits the right of copyright to such cuts, prints or engravings as are connected with the fine arts.

2. That the petition does not allege that these prints were designed or contemplated by the author as connected with the fine arts.

3. That no copyright was asked upon them separately from the advertising sheet of which they are a part.

4. That they were not offered to the public as illustrations or works connected with the fine arts.

5. In brief, that they are, upon their face, mere advertisements and scenes to be exhibited in Mr. Wallace's shows, and were not entitled to copyright under the law.

6. That the plaintiffs were not the authors of these prints, or either of them, as their petition alleged.

7. That the plaintiffs had no title to these copyrights; and if they had, it was in trust for the sole use and benefit of Mr. B. E. Wallace, who was entitled to permit and procure the printing by the defendant of the sheets offered in evidence.

I submit that the judgment of the court below should be affirmed.

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